BEFORE THE NATIONAL LABOR RELATIONS BOARD

MSR INDUSTRIAL SERVICES, LLC,

Respondent,

and

Case Nos.: 07-CA-106032
07-CA-106627

LOCAL 25, INTERNATIONAL ASSOCIATION OF BRIDGES, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, AFL-CIO,

Charging Union.

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RESPONDENT'S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

A. Introduction

On April 9, 2014, Administrative Law Judge Arthur Amchan issued a Decision finding:

(1) MSR Industrial Services, LLC ("MSR" or "Respondent") did not constructively discharge any bargaining unit employees. The ALJ stated, "I find that requiring employees to work at $58 per hour (the prevailing wage) instead of for the Union wage and benefit package of approximately $60 per hour, does not constitute sufficiently burdensome working conditions to cause employees to quit." (ALJD page 7, lines 14-17). "Here employees were not faced with the choice of relinquishing their right to bargain collectively or quit. Employees could have, after

consulting with the Union, gone on strike, continued working with the union's permission or possibly continued working after resigning from the Union." (ALJD page 7, lines 20-23).

(2) MSR did not unlawfully lockout bargaining unit employees on May 31, 2013. The ALJ stated, "Respondent did not lock out these employees; they went on strike." (ALJD page 7, lines 29-30).

(3) "[T]he consequences of Respondent's failure to comply with Section 8(d) (and therefore Sections 8(a)(5) and (1)) is that it must make the unit employees who worked for it on May 31 whole for the period June 3-27, 2013. It must also compensate Erin Early and Michael Steele for the difference between the prevailing wage and collective bargaining agreements for the period from June 27 to the expiration of the 60-day period mandated by Section 8(d), i.e., July 30, 2013. Respondent must compensate Roger Schultz for this difference for the period June 27 to July 19, when his employment terminated." (ALJD page 8, lines 31-38).

The Counsel for the General Counsel has filed exceptions to these ALJ findings.[1] For the reasons set forth below, the exceptions should be denied in their entirety and the ALJ's findings should be upheld.

B. Factual Background

1. The Dexter Wastewater Treatment Plant Project Begins on May 15, 2013.

The unfair labor practice charge allegations emanate from MSR's construction project at the Dexter Wastewater Treatment Plant. The Dexter Project started on May 15, 2013, and was expected to last 6 to 8 weeks. (Tr. 67, 102). Four bargaining unit employees represented by the Local 25, International Association of Bridge, Structural & Ornamental and Reinforcing Iron

[1] ALJ Amchan also found MSR was not bound by the 2013-19 Riggers' Agreement. (ALJD page 6, line 26). The Counsel for the General Counsel has not filed any exceptions to that finding.

Workers, AFL-CIO ("Union" or "Local 25" or "Charging Party") were initially assigned to the Dexter Project: Aaron Early, Tony Pena, Jamie Johnson, and Daryl Karpuk. (Tr. 67, 71).

2. MSR Provides Notice of Its Intent To Terminate the Parties' Collective Bargaining Agreement.

On or about February 14, 2013, MSR, through its Acting CEO, W. Gerald Webb, provided notice via email to the Union's Business Agent, Jack O'Donnell, terminating the 2010-13 Collective Bargaining Agreement. (R 1, 2; Tr. 174-78). On February 21, 2013, MSR requested to bargain with the Union. (R 3; Tr. 178-79). The parties met on February 28, 2013, during which they discussed various revisions to the 2010-13 Collective Bargaining Agreement, including direct deposit, having employees bank with a local financial institution, and ensuring sufficiently qualified workers were being assigned by the Union to MSR projects. (Tr. 180-81). At the end of the meeting, Mr. Webb told the Union representatives present, Jack O'Donnell and Dave Gonzales, that he wanted to continue to meet. (Tr. 180, 182-83).

On March 13, 2013, MSR again provided a termination notice to the Union after the Union claimed the prior email sent by Mr. Webb terminating the 2010-13 Agreement was insufficient. (R 4, Tr. 187-88). The Union's response to MSR's March 13 termination notice was to send a faxed letter to MSR on March 21, 2013, stating that "the Iron Workers Local #25 and the Great Lakes Fabricators & Erectors Association of Michigan entered into an extended six (6) year Term Agreement . . . ." (R 5, 6; Tr. 189). The Union requested MSR to "sign & date the enclosed extension as soon as possible . . . ." (R 5, 6; Tr. 189).

3. The Union Refuses to Negotiate.

MSR never signed the signature page to the 2013-19 Agreement, or otherwise advised the Union it agreed to be bound by the 2013-19 Agreement between the Union and Association. (GC 3; Tr. 190, 194). Instead, MSR desired to resume bargaining over a successor contract. (Tr. 220).

The Union, however, never contacted MSR to discuss its proposed contract changes from the February 28 meeting. (Tr. 190). Mr. Webb and Mr. O'Donnell did, however, have phone discussions after the Union requested that MSR sign the 2013-19 Agreement. During one of their discussions, Mr. O'Donnell told Mr. Webb he "wasn't at liberty to make changes to the contract" and if MSR did not sign the new contract, the Union would "have to pursue other avenues." (R 8; Tr. 195-96).

On May 29, 2013, MSR again requested the Union to "meet and negotiate." (GC 18; Tr. 140). The Union continued to refuse to meet claiming it already had a binding contract with MSR through 2019.[2] (GC 19; Tr. 141, 251-52). On May 31, 2013, MSR notified the Federal Mediation and Conciliation Service ("FMCS") of the parties' stalemate and requested its assistance. (GC 20). Upon receiving the letter, the Union requested MSR to advise FMCS to disregard its request for assistance. (GC 21). When MSR insisted on bargaining with FMCS assistance, the parties were assigned a FMCS mediator to facilitate further negotiations. (Tr. 144). However, no agreement was reached. (Tr. 144, 146).

On May 31, 2013, MSR advised the four bargaining unit employees working at the Dexter Project that although the collective bargaining agreement expired on May 31, the Union had refused to meet and negotiate. (GC 7; Tr. 75). As a result, the employees were offered an opportunity to continue working at the Dexter Project for the prevailing wage rate and were told "we would welcome your employment." (GC 7). The employees viewed the letter as MSR asking "if we wanted to come back to work for them . . . ." (Tr. 75). Bargaining unit employee

[2] On July 2, 2014, the Union, through its Motion to Withdraw Exceptions, determined that MSR was no longer bound by a contract through 2019. The Union's Motion states at Paragraph 5 "Local 25 no longer claims MSR is bound by the 2013 Riggers' Agreement." Therefore, based on the Union's Motion and the ALJ's decision, the Union's underlying basis for refusing to bargain with MSR was apparently never a legitimate reason.

Darryl Karpuk testified that once they learned they would be paid prevailing wage "we had to call our Local to see what could be done." (Tr. 109).

4. The Union Strikes the Dexter Project.

On May 31, 2013, the Union advised MSR that it viewed its actions as violating the parties' 2013-19 collective bargaining agreement and that any further actions "will result in an immediate response from the Local 25." (GC 19). Despite advising MSR that the employees intended to "report to work on Monday, June 3, 2013, at their regular starting time," the employees never attempted to show up for, or work on the Dexter Project on June 3, 2013. (Tr. 79). Thereafter, they continued to not report for work.

In the meantime, MSR continued to maintain its position that the bargaining unit employees had an "open invitation to return to work" and that its offer had been open since May 31, 2013. (GC 22). The parties met during the week of June 17, 2013, to discuss the labor dispute. (GC 23). On June 25, 2013, MSR again stated it "would greatly appreciate their return to work." (GC 22).

On June 26, 2013, the Union, despite consistently receiving communication from MSR stating the bargaining employees were welcome to resume working on the Dexter project, continued to maintain that its members were being locked out. (GC 23). Despite its assertions that its members were being locked out, the Union unilaterally made the decision to have its members return to the Dexter Project without ever reaching any type of return-to-work agreement with MSR. (GC 23). The Union then contacted its members and instructed them to return to the Dexter project on June 27, 2013. (Tr. 80, 111, 112, 115).

5. Upon Returning to Work, the Bargaining Unit Employees Are Paid A Prevailing Wage of About $2 Less Than Their "Total Package" of Union Wages and Benefits.

When the bargaining unit employees returned on June 27, 2013,[3] they were assigned the same digester lid work they previously performed and continued to perform that work through August 15, 2013. (Tr. 80, 87, 122, 129). They were compensated at the prevailing wage rate during that time period. (Tr. 86). Local 25 President Patrick Buck testified that the prevailing wage rate is "like 57.25" whereas "our total package is 58.93." (Tr. 56). According to Mr. Buck the difference in compensation was "maybe a buck different" – "if they paid them prevailing wage, it's 57 dollars and some change, and our package is 58.93." (Tr. 56). The employees' base contractual wage rate was only $26.97/hour – less than half the prevailing wage rate. (GC 5).

6. The Union Files Its Unfair Labor Practice Charge.

On August 26, 2013, the Union filed an unfair labor practice charge alleging violations of Sections 8(a)(1), (3), and (5) of the NLRA in conjunction with the work being performed by bargaining unit employees at the Dexter Project in June 2013 and how their compensation and benefits were changed. On September 30, 2013, the General Counsel issued a Consolidated Complaint for NLRB Case Nos. 7-CA-106032 and 7-CA-106627. A hearing was held before Administrative Law Judge Arthur J. Amchan on January 8-9, 2014. As discussed above, a Decision was issued on April 9, 2014 to which the Counsel for the General Counsel has filed exceptions. For the reasons set forth below, MSR requests that the exceptions be dismissed in their entirety and that the Administrative Law Judge's decision and recommended order dismissing certain charge allegations against it be adopted.

C. Legal Argument

[3] The employees who returned to work were Aaron Early, Mike Steele, and Roger Schultz. (Tr. 80, 122). Darryl Karpuk did not return because he got another job. (Tr. 112). Roger Schultz worked a few weeks before being terminated. (Tr. 84-85). He was not replaced by another bargaining unit member. (Tr. 84).

1. No Employees Were Constructively Discharged.

The ALJ properly concluded that the Counsel for the General Counsel did not satisfy her burden of proving a constructive discharge by a preponderance of the evidence. An employee is constructively discharged when it is shown an employer conditions continued employment on abandonment of Section 7 rights and the employee quits rather than complying with the condition. *Intercon I (Zercom)*, 333 NLRB 223 (2001).

a. MSR Never Conditioned Continued Employment on Abandonment of Section 7 Rights.

"Not every case where an employee quits in reaction to an unfair labor practice constitutes a constructive discharge." *Id.* at 224. There is no constructive discharge because MSR never conditioned any bargaining employee's continued employment beyond May 31, 2013, on relinquishing his Section 7 rights. *Comfort Inn*, 301 NLRB 714, 717 (1991) (finding no constructive discharge where employees who resigned were never told, assumed, or had reason to believe their employment was contingent upon foregoing their Section 7 rights).

Here, none of the employees had a reasonable basis to conclude they faced a choice of having to abandon their right to engage in Section 7 activity, or be terminated. *Id.* MSR never told any employees they were prohibited from going on strike, or otherwise engaging in Section 7 activity. In fact, MSR encouraged employees on May 31, 2013, to continue working on the Dexter Project by advising them "[i]f you are interested in continuing work with us on this project for prevailing wage, we would welcome your employment." (GC 7). Thereafter, MSR continuously expressed its desire to have the employees return to work and stated it "would greatly appreciate their return to work." (GC 22).

MSR never threatened to terminate any bargaining unit employees and never made any anti-Union comments during the course of the parties' labor dispute. The bargaining unit

employees, after consulting with their Union, ultimately chose to exercise their Section 7 rights by striking – a decision that was respected by MSR as evidenced by its continued offers to have them return to work and willingness to immediately reinstate all of the employees upon conclusion of their strike. (GC 7, 18, 20, 22; Tr. 111, 112, 115).

MSR also honored the employees' Section 7 rights before and after May 31, 2013, by offering to bargain with the Union numerous times over a successor contract. (GC 7, 18, 20). The Union consistently refused to negotiate and has since acknowledged it never had a binding agreement that justified its refusals to bargain. (GC 21; Union's Motion to Withdraw Exceptions). In other words, MSR was undertaking every possible effort to have its employees continue working on the Dexter Project and also obtain a new contract with the Union – the complete antithesis of conduct conditioning its employees' continued employment on relinquishing their Section 7 rights. It was the employees' personal decision, after consultation with their Union, to not report for work on June 3, or ultimately not return at all. (Tr. 112, 114, 115). MSR never imposed any conditions upon them that forced any of them to quit.

b. The Employees Did Not Quit Because They Were Paid Prevailing Wage.

The Counsel for the General Counsel also failed to prove that any bargaining unit employees quit their employment because they were being paid the prevailing wage rate. Mr. Early testified that other employees simply did not return to work upon conclusion of the strike. (Tr. 80). He provided no reason for their refusal to return.[4] Mr. Karpuk testified, however, that he did not return because he had been hired for another job. (Tr. 112, 115). Neither Mr. Early nor

[4] The Counsel for the General Counsel claims that bargaining unit employees faced possible internal union charges for violating the Union's Constitution and Bylaws if they returned without the Union's permission. (Exceptions Brief, p. 10). No such evidence of potential internal Union discipline was introduced into the record. Further, the record shows the Union approved employees returning to work as of June 27, even though they were only being paid prevailing wage. (GC 23; Tr. 80, 111).

Mr. Karpuk testified that an employee refused to return to MSR because it was paying the prevailing wage rate. As a result, the ALJ properly found there was insufficient evidence to prove constructive discharge.

c. There Was No Constructive Discharge Due to Changed Working Conditions.

A constructive discharge may also occur by showing: (1) the burdens imposed on the employee must cause, and be intended to cause, a change in the working conditions so difficult or unpleasant as to force the employee to resign; and (2) the burdens must have been imposed because of the employees' protected activities. *KRI Constructors*, 290 NLRB 802, 814 (1988) (emphasis added).

The ALJ properly relied on *KRI Constructors, Inc.*, 290 NLRB 802, 814 (1988), in finding no constructive discharge. In *KRI Constructors*, the Board found no constructive discharge where employees voluntarily quit after being paid $1.90 less per hour than their prior wage rate. The Board found "the burden imposed by Respondent was not so 'difficult and unpleasant' as to force the [employees] to resign." *Id.* at 814. The ALJ reached the same conclusion here and should be affirmed – the minimal financial burden was insufficient to force any bargaining unit employees to quit. Although the Counsel for the General Counsel argues that the bargaining unit employees surrendered certain fringe benefits negotiated by the Union, their changed working conditions were still minimal and in line with *KRI Constructors*. According to Local 25 President, Patrick Buck, by receiving the prevailing wage, the bargaining unit employees received slightly less than $2 of their total Union wages and benefits package. (Tr. 56). In addition, MSR paid the bargaining unit employees more than twice their base wage, which was $26.97. (GC 5). No reasonable employee would have resigned under the circumstances. *Id.* at 814-15 ("The test is of necessity, an objective one, taking into account the

circumstances of each case. The mere existence of discrimination is insufficient to warrant consideration of abandonment of employment as constructive discharge.").

Further, upon their reinstatement on June 27, the employees were not transferred to new, or more burdensome job assignments. When the bargaining unit employees returned on June 27, 2013, they were assigned the same digester lid work they previously performed and continued to perform that work for the remainder of the project. (Tr. 80, 87, 122, 129).

MSR simply offered bargaining unit employees the opportunity to continue working beyond May 31 on the Dexter Project at the prevailing wage rate. MSR never told employees they should could consider quitting. Nor was it foreseeable that any employees would resign. As the ALJ found, after MSR announced it intended to pay prevailing wage, the employees had a variety of choices to pick from instead of simply quitting (ALJD page 7, lines 21-23). In fact, as previously discussed, they exercised their Section 7 rights by engaging in a strike starting June 3. When the employees ended their strike and expressed an intention to return to work, MSR immediately reinstated them. Beyond Mr. Karpuk's testimony that he did not return because he had found another job, there is no record evidence showing they refused to return because of any burdens imposed upon them by MSR. (Tr. 112, 115).

The ALJ correctly found that the instant case is distinguishable from *White-Evans Service Co.* given that MSR continuously attempted to bargain with the Union, and never made any references to becoming a non-union contractor. MSR's paying employees approximately $2 less than their <u>total</u> wages and benefits package, but significantly more than their base wage, was also far less onerous than the substantial changes in *White-Evans Service Co*. Stated simply, the changed working conditions were not sufficiently onerous to compel an objectively reasonable employee to quit.

MSR also did not impose any burdensome working conditions upon employees because they engaged in protected activities. There is no evidence whatsoever that the employees engaged in any Section 7 activities, or talked about doing so, that would have motivated MSR to pay them prevailing wage in an effort to force them to quit. The employees were not picketing, hand billing, wearing buttons/shirts, circulating petitions, etc. at the time MSR announced on May 31, 2013, that it would start paying prevailing wage. Since the employees did not engage, or threaten to engage in any protected activity, there is no basis to conclude MSR had decided to pay the prevailing wage to employees because they had previously engaged in such activity.

Since the Counsel for the General Counsel has not satisfied either element of proving constructive discharge, the exceptions should be dismissed.

2. The ALJ Properly Found That The Bargaining Unit Went on Strike.

MSR never told the four bargaining unit employees working at the Dexter Project that they were being locked out. In fact, they were told on May 31, 2013, "we would welcome your employment." (GC 7). The Union's response later that day, however, was to advise MSR that there would be "an immediate response from the Local 25" if MSR did not comply with the 2013-19 Riggers' Agreement[5] -- a threat consistent with Mr. O'Donnell's May 30 statement to Mr. Webb that the Union "will be looking at other avenues." (R 8, GC 19; Tr. 195-96).

MSR immediately responded that it considered the Union's statements to be a threat to strike starting June 3, 2013. (GC 20). Although the Union claimed its members would report to work on June 3, after speaking with the Union, they never showed up, or attempted to. (GC 21; Tr. 112, 114-15). On June 25, 2013, MSR reiterated that employees had an open offer to return to work and that such an offer had remained open since May 31 (GC 22). MSR again restated

[5] An agreement the ALJ found MSR was not bound to. The General Counsel and Union did not file any exceptions to that finding.

that the bargaining unit employees could report to work tomorrow at Dexter for the prevailing wage and that it "would greatly appreciate their return to work." (GC 22). On June 26, 2013, the Union stated that although MSR had not "agreed" to let Local 25 members return to work, its members were nevertheless returning June 26, which they did. (GC 23).

The ALJ correctly found that, instead of being locked out, the employees engaged in a strike. The four bargaining unit employees were given an open invitation to continue working at the Dexter Project for the prevailing wage rate, but refused to report for work from June 3-26, 2013. They could have returned to work on any of those days and MSR would have allowed them to work. Whether or not the employees believed they were engaging in a strike does not change the fact that they withheld their labor instead of returning to work.[6]

MSR never prevented the bargaining unit employees from working on the Dexter project from June 3-26 and consistently encouraged them to return. There is no communication from MSR to the Union stating the bargaining unit was being locked out. The Union has simply attempted to mischaracterize their work stoppage as a lockout. The actual reason why the bargaining unit was not working from June 3-26, 2013 is because they were on strike, not because MSR refused to let them work.

The employees' method of return to the Dexter Project also supports the ALJ's strike finding. The employees returned by telling MSR they intended to return to work even though there was no "agreement" to have Local 25 members return to work. (GC 23). In other words, the Union solely controlled when the bargaining unit employees returned to work. On June 26, the Union determined it was no longer going to withhold their services and, therefore, they returned on June 27 to work for the prevailing wage rate. MSR accepted their return. If the

[6] Mr. Karpuk testified that the employees called "our Local to see what could be done." (Tr. 109). Thereafter, they did not report for work from June 3-26, 2013.

employees were being locked out, MSR would not have accepted their return, or, at the very least, required a return-to-work agreement before they were permitted to return.

The ALJ's decision finding a strike is supported by the record evidence and, therefore, should be affirmed.

3. The ALJ Properly Found That Section 8(d) Only Precludes Changes To Working Conditions Through July 30, 2013.

The ALJ found that MSR was required to maintain existing terms and conditions of employment for 60 days after expiration of the parties' labor contract on May 31, 2013. (ALJD page 8, lines 21-23). The Counsel for the General Counsel argues that MSR is obligated to continue the bargaining unit employee's terms and conditions until proper notice is given pursuant to Section 8(d)(3). MSR notified FMCS of the parties' stalemate in negotiations and requested its assistance on May 31, 2013, but never notified the state mediation agency, the Michigan Employment Relations Commission (MERC). The purpose of providing a Section 8(d)(3) notice is so the parties can mediate and conciliate any disputes before the contract expires. *Douglas Autotech*, 357 NLRB No. 111, at 3 (2011) (Section 8(d) notice requirements are designed to promote the use of mediation to assist the parties in resolving their disputes peaceably).

More than 60 days passed between February 14, 2013, when MSR first notified the Union of its desire to terminate the agreement and June 3, 2013 when MSR implemented the prevailing wage. Although MERC was not notified along with FMCS on May 31, the record shows the Union had refused to negotiate a successor contract by that date and had no interest in doing so. In fact, the Union advised MSR on May 31, 2013, to tell FMCS to disregard its request for assistance. (GC 21), Therefore, even though MSR did not notify MERC about the parties' labor dispute on May 31, doing so would not have changed the end result – the parties being in a

stalemate. Subsequent involvement by FMCS did not resolve the stalemate either. (Tr. 144, 146).

Although the Counsel for the General Counsel contends that the failure to notify MERC bars any changes to terms and conditions of employment after July 30, the decisions cited in support of that proposition are factually distinguishable. The decisions do not involve a party steadfastly refusing to bargain over a successor contract as the Union was here. The Union's persistent refusal to bargain because of its (now abandoned) belief that MSR was bound by a successor contract rendered the entire purpose of the mediation notices superfluous – there was no need for a 60 day "cooling off" period when the Union had no desire to negotiate and was already made aware in February of MSR's decision to terminate the agreement.

Further, the Board has found in a case involving a Michigan employer that simply providing notice to FMCS without simultaneously notifying MERC was sufficient notice to comply with Section 8(d)(3). *Douglas Autotech, Corp.*, 357 NLRB No. 111, at 22 (2011); *see also Communications Workers of America v. Southwestern Bell Telephone Co.*, 713 F.3d 1118, 1126 (5th Cir. 1983) (finding employer properly terminated contract despite its failure to notify both state and federal mediation agencies and that such failure will not serve to extend a contract terminated via a Section 8(d) notice). As a result, the Respondent's notice to FMCS, when the totality of the circumstances are considered, should be deemed sufficient. The ALJ properly ruled that MSR had the right to make changes to terms and conditions of employment after July 30, 2013.

D. Conclusion

For the foregoing reasons, MSR respectfully requests that the Board adopt the above-referenced findings and conclusions of the Administrative Law Judge and dismiss the Counsel for the General Counsel's Exceptions in their entirety.

Respectfully submitted,

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Dated: July 17, 2014

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CERTIFICATE OF SERVICE

I certify that on July 17, 2014, I electronically served Respondent's Brief in Reply to General Counsel's Exceptions to the Administrative Law Judge upon the following parties:

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